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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/672,401	09/26/2003	Steven E. Guzorek	23635-218007	9149

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EXAMINER

BASICHAS, ALFRED

ART UNIT PAPER NUMBER

3749

DATE MAILED: 03/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/672,401

Applicant(s)

GUZOREK, STEVEN E.

Examiner

Alfred Basichas

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 January 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-10 is/are pending in the application.
- 4a) Of the above claim(s) 6-10 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) 6-10 are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

1. This application contains claims 6-10 drawn to an invention nonelected with traverse. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP § 821.01.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 1, 3, and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dameworth (5,911,217) in view of Swenson (4,266,929), Official Notice, and

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Tsutsui (4,501,261). Dameworth discloses substantially all of the claimed limitation including, among other things, a drive unit 94, an axle 98 having a pinion/gear 114 (clearly drawn as such and known to those skilled in the art), and a generally circular damper 70. Such an arrangement has the clear and obvious benefit of providing for effective and efficient drive mechanism for venting a heating device.

a. Nevertheless, Dameworth does not specifically recite the type of drive unit. Swenson teaches a fluid actuated damper in which the drive unit 60 includes a diaphragm 68 having a first and second positions (figs. 2,3) for driving the damper between a first and second positions via a linkage system 92,94,96.

b. Swenson does not specifically recite using a rack and pinion system for transferring mechanical motion between the diaphragm and the damper. Official Notice is given that the functional equivalence and interchangeability of a rack and pinion system and a linkage system is old and well known in the art. Both systems are effective and efficient and the selection of one over the other is simply based on availability and cost of manufacture. Accordingly, it would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the drive mechanism of Swenson and a rack and pinion system motion into the invention disclosed by Dameworth, so as to provide for effective and efficient drive mechanism for venting and based on availability and cost of manufacture, respectively.

c. Further, Dameworth and Swenson do not disclose sensing the position of the damper. Tsutsui teaches a damper assembly for a gas water heater including

a sensor 20 for sensing the position of the damper so as to provide for efficient control of the apparatus. Accordingly, it would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the position sensing of Tsutsui into the invention disclosed by Dameworth in view of Swenson and Official Notice, so as to provide for efficient control of the apparatus.

d. It should be noted that while various structural differences exist between the above inventions, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

5. Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dameworth (5,911,217) in view of Swenson (4,266,929), Official Notice and Tsutsui (4,501,261), and further in view of Benson (4,488,853). Dameworth and Swenson disclose substantially all of the claimed limitation, but fail to specifically recite the use of a bellows. Benson teaches that diaphragms and bellows are equivalent and interchangeable (see at least col. 17, lines 15-17). The use of one or the other is an obvious modification based on design choice, and depends on capacity and the like. In view of the absence of criticality for this particular design, it would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the use of a

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bellows as taught by Benson into the invention disclosed by the combination of Dameworth in view of Swenson, so as to provide for the desired capacity.

6. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dameworth (5,911,217) in view of Swenson (4,266,929), Official Notice and Tsutsui (4,501,261), and further in view of Johnson (1,991,557). Dameworth and Swenson disclose substantially all of the claimed limitation, but fail to specifically recite a non-central pivot point. Johnson teaches a damper 64 for a water heater with an offset pivot point that provides for better balance and therefore greater effectiveness and efficiency (see at least page 2, lines 54-69). Accordingly, it would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the use of offsetting the pivot point as taught by Johnson into the invention disclosed by the combination of Dameworth in view of Swenson, so as to provide for greater balance and efficiency.

Response to Arguments

7. Applicants' arguments with regard to the rejected claims, filed January 27, 2005, have been considered, but are deemed moot in view of the new grounds for rejection.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alfred Basichas whose telephone number is 571 272 4871. The examiner can normally be reached on Monday through Friday during regular business hours.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ira Lazarus can be reached on 571 272 4877. The fax phone numbers for the organization where this application or proceeding is assigned are 703 872 9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Tech Center telephone number is 571 272 3700.

March 21, 2005


Alfred Basichas
Primary Examiner